IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.07.2006

Coram:

The Honourable Mr.Justice J.A.K.SAMPATH KUMAR

A.S.No.650 of 1992

1. The Oriental Insurance Co. Ltd,
Registered office at 25/27,
Asaf Ali Road,
New Delhi - 110 002 and
Divisional Office,
At 4, Head Quarters Road, Coimbatore.

2. M/s. South India Viscose Ltd.,
Having its Registered at
Rosebed, 334, Avinashi Road,
Coimbatore - 18
Represented by its
Power of Attorney
The Oriental Insurance
Company Limited. Appellants/Plaintiffs

vs.

M/s. Kalpaka Transport Co. Ltd.,
Public Carrier, Having its
Head office at 6/337,
G YMCA Road, Calcutta - 673 001
and Branch Office
at 6/192, Trichy Road,
Coimbatore 641 045. Respondent/Defendant

The Appeal is filed under Section 96 and Order XLI Rule 1of C.P.C. against the Judgment and decree of the Learned II Additional Subordinate Judge, Coimbatore passed on 13.12.91 in O.S.NO.694 of 1988.

WEB COPY

For Appellants : Mr. Nageswaran
for M/s.Nageswaran & Narichania

For respondent : Mr. N.S. Varadachari

....

https://hcservices.ecourts.gov.in/hcservices/

JUDGMENT

This appeal is filed against the Judgment and decree dated 13.12.91 in O.S.NO.694 of 1998 on the file of the Additional Sub Court, Coimbatore, in and by which the learned Additional Subordinate Judge held that the plaintiff is not entitled to the suit claim and accordingly, dismissed the suit.

2. For convenience, the parties are referred as arrayed in the suit.

3. The brief facts of the case are as follows:

> 3. On 23.11.1985, the second plaintiff, consigned 80 cases of Royan Yarn, from their industry at Sirumugai, Mettupalayam to their depot at Dayananda Nagar, Amristar and entrusted the said goods worth Rs.3,71,191-50 with the defendant a public carrier for being transported from Sirumugai to Amristar through lorry. The defendant, being a public carrier, agreed to and is even otherwise bound under law to deliver the goods safely to the place of delivery at Amristar. The goods were consigned under the defendants LR.No.2865487 dated 23.11.85.
>
> 4. The defendant failed to effect safe and due delivery of the goods at the plaintiff's depot at Amritsar. Out of the 80 cases, only 45 cases were in good condition. The remaining 35 cases were loose by packed, damaged, mixed up and water damaged condition and the contents were short in some of the cases when the goods arrived at Amristar. The second plaintiff had the above goods insured with the first plaintiff under Policy No.41310/0/0M/11361/OPL. Therefore on the arrival of the goods at Amritsar, the first plaintiff appointed a licensed surveyor to assess the loss occurred due to the damaged condition/short delivery of the goods. Their surveyor assessed the net amount of loss at Rs.81,928/-. The defendant has issued a open delivery certificate No.KTP/AMR/ODC/02/86 dated 22.2.86 showing the damaged condition/short delivery of the goods.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

6. As the defendant has not effected safe delivery of the goods at Amritsar, the second plaintiff claimed the total value of loss sustained by them due to the short delivery/damage of goods of Rs.75,792.20 from the first plaintiff by enforcing the insurance policy mentioned supra. The first plaintiff being bound under law to pay the insured (the second plaintiff) accordingly paid a sum of Rs.75,792.20 to the second plaintiff and thus discharged its obligation and claim made under the policy.

7. The insured (2nd plaintiff) having a right of action against the defendant for recovery of the total value of the loss due to damaged/short delivery of goods, constituted, the first plaintiff as their power agent, enabling the first plaintiff to file a suit in a court of law against the defendant for the recovery of the claim monies on their behalf and in their name and given valid discharge by executing a power of attorney in that behalf. The second plaintiff has also executed a letter of subrogation, in first plaintiff's favour, enabling the first plaintiff to have the right of reimbursement from the defendant by making a claim against the defendant.

The plaintiffs state that since the second plaintiff has already been reimbursed the loss by the first plaintiff, the second plaintiff is being added only as a formal party in this action by way of abundant caution.

4. Inspite of the repeated requests, the defendant failed and neglected to pay the suit amount. Hence the suit.

5. The defendant states as follows:

"The consignment was carried with at most care and caution throughout the journey and delivery was accepted at the destination on 12.12.1985 without any demur. The purported taking of an open delivery certificate from the branch dated 22.02.1986 to support the claim for insurance, cannot affect the defendant's right in any manner. The defendant is not therefore under any obligation to pay any damages to the plaintiff. Hence the suit is liable to be dismissed."

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

6. Two witnesses were examined and twelve Exhibits were marked on the side of the appellants/plaintiffs to prove their claim. One witness was examined on the side of the defendant.

7. On going through both the oral and documentary evidence available on record, the lower court came to the conclusion that the appellants/plaintiffs are not entitled for the suit claim and accordingly, dismissed the suit.

8. Heard Mr. Nageswaran, learned counsel appearing for the Appellants/Plaintiffs and Mr.N.S.Varadachari, learned counsel appearing for the Respondent/Defendant.

9. The plaintiffs are the appellants and the defendant is the respondent.

10. Upon hearing the arguments and rival contentions of the parties, the following points have to be considered to find out whether the finding of the Lower Court in dismissing the Suit is in order or otherwise:-

(i) Whether the suit property was entrusted to the defendant for delivery to the second plaintiff?

(ii) Whether there was any short delivery of goods by the defendant as alleged by the plaintiffs?

(iii) Whether the defendant really delivered the goods to the second plaintiff in the same condition received from the consignor?

(iv) Whether the finding of the lower court without giving full effect to Ex.A.4 is in order?

(v) Whether the finding of the lower court dismissing the suit is in order?

11. Point Nos.1 to 5:

(i) It is true that the defendant being a road carrier was entrusted with the task of delivering 80 cases of Rayon Yarn to take delivery from the second plaintiff's industry at Sirumugai, Mettupalayam and handed over to their depot at Dayananda Nagar, Amristar on 23.11.1985 and it is worth Rs.3,71,191.50,

(ii) Ex. A.1 is the Insurance Policy given by the first plaintiff in favour of the second plaintiff.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(iii) Ex.A.2. is the consignment note.

(iv) Ex.A.3 is the letter of the second plaintiff in which it was informed that the loss due to the damaged/short delivery consignment estimated at Rs.70896.11.

(v) Ex.A.4 is the open delivery certificate.

(vi) Ex.A.5 is the Marine claim assessment report, to prove the claim against the defendant.

(vii)Exs.A.6 to A.12 would prove that the second plaintiff received the insurance claim from the first plaintiff and authorised the first plaintiff to claim the same from the defendant.

12. Now, the main point for consideration is whether the lower court has given due consideration to the open delivery certificate, which is marked as Exhibit A.4, given by the defendant to the second plaintiff to claim damages from the insurance company, namely, the first plaintiff.

13. In the written statement itself the second defendant admitted that he had given a open delivery certificate of the company dated 22.02.1986 to support the insurance claim.

14. In the written pleadings it is stated as follows:

> " The purported taking of an open delivery certificate from the branch dated 22.2.86 to support the claim for insurance cannot affect the defendant's right in any manner"

15. At this juncture, it is useful to refer the averment contained in Ex.A.4, which reads as follows:

Exhibit A.4

Name of Company: Kalpaka Transport Co. Ltd.,
Bazar Bakarwan,
Shaheed Bhugat Singh Road,
Amritsar - 143 001.

OPEN DELIVERY CERTIFICATE

(Issued without prejudice to the rights & claims of the Company)

No.KTP/AMR/ODC/02/96 Date: 22.2.86

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

1. Lorry Receipt No.& date : 2865487 dt. 23.11.85.

2. From/To : Meettupalayam/Amritsar

3. Consignor's name and address : M/s. South Indian Viscose Ltd.,

4. Consignee's name and address : M/s. South Indian Viscose Ltd.,

5. Description of goods : Rayon Yarn

6. No. of articles : Eighty cases.

7. Weight as per L/receipt : 9521 kgs.

8. Remarks if any made in the L/Receipt : -----

9. Freight to PAY/PAID : To be Billed at Coimbatore

10. Date received & delivered : 12.12.85

11. C/R No./DAM No. with date:

12. Consignor's Inv.No. Value and date. : DO/BC No.ARC-3 Sub 85/86 dated 19.11.85.

13. Declared value as per L/R: 371191-50

14. Details of goods delivered : Seventy SN cases and Twenty one cens.

15. Weight of goods delivered: 9099 kgs.

16. Shortage in weight on delivery, if any. : 422 Kgs.

17. Nature & extent of shortages or leakages : 3 cases and 27 cons short, damage 14 canes (1260 cons)

18. Invoice value of damaged/short delivered or leaked out goods. (as detailed on reverse) : Damage goods value Rs.65621.70 short delivered goods value Rs.16898.75

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

19. Salvages (State whether taken by the consignee or left behind)	:	Taken by the consignee
20. Value of Salvages (If fixed by the consignees subject to H.O. approval)	:	as per South Indian Viscose letter No.453 dt. 16.12.85. salvage value Rs.13124.34
21. Net amount of claim (col.81 minutes 21)	:	Rs.70896-11
22. Outer Condition of packing on delivery	:	Most of the cones are open condition.
23. Inside condition of packing on delivery (State if insufficient straw or buffering material, defective nailing etc).	:	Packed in light wooden cases.
24. Other remarks, if any, (State if packing loose, drums crated or not, leaking through joints, outlets of screws or taps).	:	Loose packing - not bearable for long distance of transportation
25. If insured - give gull particulars	:	Insured with Oriental Insurance Co, Ltd., Coimbatore.

- -

This Certificate is no acknowledgment of any liability or responsibility on the part of the carriers.

WEB COPY

Sd/-.....

Signature and address of the consignee

Signature of the carieers

Kalpaka Transport Co., Ltd.,
Bazar Bakarwan, Shaheed Bhagat Singh Road, Amritsar - 143 001.

https://hcservices.ecourts.gov.in/hcservices/

Details of invoice value
of damages etc., shown in
Col. No.18.

---

16. In the said certificate the defendant admitted the receipt of 9521 Kgs. of Rayon Yarn. He also admitted the shortage in weight of 422 Kgs. of Rayon Yarn. The nature and extent of damages, shortages or leakages have been explained under column 17. The invoice value of damaged goods valued at Rs.65621.70 and the short delivered goods valued at Rs.16898.75/-. The net amount of claim is valued at Rs.70896.11.

17. The defendant further admitted that most of the cases were in open condition packed in light wooden cases. He further explained the reasons, for such damages. He further emphasises in the said certificate that because of the loose packages, the goods could not bear for long distance, resulting in damages. The said exhibit would prove that the certificate was given to the second plaintiff for insurance claim from the first plaintiff. It also shows that the damages were caused only during the transit. Having admitted so in the written letter, it is not opened to the defendant to contend that the goods were delivered to the second plaintiff in good condition.

18. The lower court without giving due weight to Ex.A.4 observed that the plaintiffs have to prove the damages independently apart from Ex.A.4. Such an approach, would render only injustice to a person, who is entitled to the suit claim, as the defendant themselves having admitted that they have given Ex.A.4 to the second plaintiff to claim insurance.

19. From the evidence and from the arguments of the learned counsel for the appellant the defence theory is culled out in two folds.

1. The defendant delivered the goods to the second plaintiff in the same condition as it was given to them. That means, the defendant delivered the goods only in good condition.

2. Though the defendant delivered the goods in good condition, they have given Ex.A.4 to the second plaintiff to make false insurance claim.

3. If viewed in any angle it would reveal that;

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

i) As per Ex.A.4, damaged goods and shortage of goods were delivered by the defendant to the plaintiff

"or"

ii)Though the materials were delivered by the defendant to the second plaintiff in good condition, in order to facilitate the second plaintiff to make false claim from the first plaintiff, the defendant issued Ex.A.4.

4.(i) If the first contention is accepted, then the defendant is to necessarily pay the suit claim

"and"

(ii) If the 2nd contention is accepted, even then, the first plaintiff is, not only entitled to claim suit amount from the second plaintiff and the defendant, but also sue them for penal action. In this regard the defendant would be an abutter for making false claim, by the second plaintiff to the first plaintiff.

20. The defendant, being a public carrier, is not supposed to make inconsistent defence one before the insurance company to facilitate the second plaintiff to make a false insurance claim and then before the court that the suit property were delivered to second plaintiff in good condition to exonerate him from their liability. Though the lower court also considering the material aspects discussed above rendered a wrong finding, resulting to miscarriage of justice against the plaintiffs.

21. The learned counsel for the appellants relied on the decisions reported in 1. 1988-1.L.W. 328 (THIRUPPATHI VENKATACHALAPATHY LORRY SERVICE, THROUGH PARTNER N. RATHINASAMI NADAR VS. THE NEW INDIA ASSURANCE LIMITED, MADURAI THROUGH DIVISIONAL MANAGER) 2. 2001-1-L.W. 756 (NATH BROS. EXIM INTERNATIONAL LTD., VS. BEST ROADWAYS LIMITED) and 3. 2004 (4) CTC 273 (PATEL ROADWAYS LIMITED (FORMERLY PATEL ROADWAYS PRIVATE LIMITED) VS. SESHASAYEE INDUSTRIES LIMITED) and argued that the defendant alone is liable to pay the suit claim.

(i) In the first decision 1988, it is held that

> "it is a well established principle of law that whoever agrees to transport goods to the public is a public carrier and is liable to pay damages while an accident took place in the course of the said contract."

(ii) In the second decision, it is held that

> "no burden on the owner to show that the loss or damage was caused owing to negligence in criminal act of carrier, as provided by Section

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

9. Carrier can escape liability only if it is due to act of God or enemies of State. Liability of carrier is that of an insurer and is absolute. Duty of carrier to deliver goods safely, undamaged and without loss."

(iii) In the third decision it is held that "the plaintiffs who seek damages against common carrier for loss, damage or non-delivery of goods need not prove that damage occurred owing to negligence or criminal act of carrier provided such carrier is common carrier."

22. The principles laid down in the decisions referred above are applicable to the case on hand. Though there is reference in Ex.A.4 that the defendant Issued without prejudice to the rights & claims of the Company, it will bind the defendant in view of their own admission. The survey report marked as exhibit A.5 reveals that the goods were delivered in damaged condition and there was also a short delivery of goods. But the lower court failed to look into the document namely Ex.A.5 in the right perspective. Since as stated above Ex.A.4 was issued by the defendant, to facilitate second plaintiff for insurance claim, any reference contained therein would not in any way absolve the defendant from any liability. In totality, the defendant has not delivered the goods to the second plaintiff in good condition. Therefore it is seen that the lower court ignoring the admission of the defendant in Ex.A.4 rendered a wrong finding and dismissed the suit and hence the finding of the lower court is liable to be set aside and accordingly it is set aside.

23. Before parting with the case I am rendering the following observation to emphasise the just decision of the case. The act of the defendant, being a public carrier disowning the liability after admitting the damages in the written document namely Ex.A.4 for use of the same by the plaintiff to claim damages from the Insurance Company, is highly condemnable. Such act would also attract penal action against the defendants. Ex. A.4 is to be treated as valid in the eye of law treating any kind of protective clause is non-est, considering the double standard adopted by the defendants, one before the competent Court of law in disowning the claim and another before the Insurance Claim forum justifying the damage certificate.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

24. In the result, the Appeal is allowed with cost. The finding of the lower court in dismissing the suit is set aside and the suit is decreed as prayed for with costs.

cla

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The II Additional Subordinate Judge,
Coimbatore.

2. The Record Keeper,
VR Section,
High Court, Madras.

1 cc to Mr.S.Nageswaran, Advocate, SR.29024

jrg (co)

dv/22.12.06

A.S.No.650 of 1992

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/